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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act
--Competitive Bidding for Commercial
Broadcast and Instructional Television
Fixed Service Licensees)

MM Docket No. 97-234

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings)

GC Docket No. 92-52

Proposals to Reform the Commission's
Comparative Hearing Process to
Expedite the Resolution of Cases)

GEN Docket No. 90-264

To: The Commission

COMMENTS OF ITFS PARTIES

Arizona Board of Regents for Benefit of the University of Arizona, Board of Regents of the University of Wisconsin System, California State University, Calnet, the Ohio State University, Oregon State System of Higher Education, San Diego County Superintendent of Schools, Santa Ana Unified School District, South Carolina Educational Television Commission and University System of the Ana G. Mendez Educational Foundation (collectively, the "ITFS Parties"), by their counsel, submit these comments in response to the Commission's *Notice of Proposed Rulemaking* in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, FCC 97-397 ("NPRM"), relating to the implementation of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) ("Balanced Budget Act"), which expanded the

FCC's competitive bidding authority to include mutually exclusive initial license applications for certain types of stations.

Introduction

The ITFS Parties are public and private universities and university systems, school districts, consortia of educators engaged in distance learning, and governmental educational telecommunications entities. The ITFS Parties are experienced licensees of ITFS stations providing critical educational services to students and other learners in schools, workplaces and homes; indeed, the ITFS Parties are operators of some of the oldest, largest and most innovative ITFS systems in the country. The ITFS Parties are from time to time applicants for new or modified ITFS stations, and due to their status in areas they seek to serve, they are generally preferred applicants under the comparative point system now applied by the Commission to resolve mutually exclusive ITFS applications. They would be adversely affected if the Commission were to determine to use competitive bidding to select among ITFS applications. These comments are limited to that issue.

Balanced Budget Act of 1997 Does Not Require Auctioning of ITFS Channels

The ITFS Parties believe that, in the Balanced Budget Act of 1997, Congress did not intend for the Commission to require mutually exclusive ITFS applications to go to competitive bidding. Although new Section 309(j)(1) of the Communications Act refers to "mutually exclusive applications ... for any initial license or construction permit," the legislative history of the subsection suggests that Congress' focus was on radio and television broadcast licenses.

Thus, the House Conference Report states only that "[a]ny mutually exclusive applications for radio or television broadcast licenses received after June 30, 1997, shall be subject to the Commission's rules regarding competitive bidding, including applications for secondary broadcast services such as low power television, television translators, and television booster stations." H. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. 573 (1997). Obviously, ITFS stations are not radio or television broadcast stations. Public Broadcasting Service, 96 FCC2d 555, 561 (1984).

In new Section 309(j)(2)(C), the Balanced Budget Act exempted certain types of applications from the competitive bidding process, including "stations described in Section 397(6) of this Act." Section 397(6) refers to "noncommercial educational broadcast stations" and "public broadcast stations." Assuming that Congress, as reflected in the House Conference Report, did not intend to have nonbroadcast ITFS applications go to competitive bidding, it makes sense that they would not otherwise be exempted in Section 309(j)(2)(C).

However, it is possible that Congress did not have in mind the ITFS service in enacting the Balanced Budget Act, therefore it did not specifically intend to include or exempt ITFS applications from the requirements of the Act. If so, the Commission should look to the nature of the ITFS service, as compared to services otherwise included or exempted from competitive bidding requirements, to determine whether ITFS applications should be included. The ITFS Parties urge that the ITFS service is so akin to the noncommercial educational FM and TV broadcast services that it should be treated as coming within the exemption provided by Section 309(j)(2)(C).

Section 397(6), which describes facilities exempt from the competitive bidding process, defines noncommercial educational broadcast stations and public broadcast stations as TV or radio stations which, under the FCC's rules, are eligible to be licensed by the Commission for those services and are owned and operated by a public agency or nonprofit private foundation, corporation, or association. Under Sections 73.503 and 73.621 of the FCC's rules, which establish eligibility for noncommercial educational FM and TV stations, stations are only licensed to nonprofit educational organizations upon showing that the station will be used to serve the educational needs of the community or for the advancement of the an educational program.

Similarly, under Section 74.932 of the rules, ITFS licenses are only issued to accredited educational institutions or governmental organizations (such as school boards) engaged in the formal education of enrolled students, or to nonprofit educational organizations whose purposes include providing educational programming to such institutions or organizations. Furthermore, the primary purpose of ITFS stations, as set forth in Section 74.931, is to provide formal educational and cultural development programming to students enrolled in accredited schools. Thus, if anything, ITFS stations are more focused than public broadcasting stations with respect to their nonprofit and educational mission. The FCC should therefore exercise its authority in Section 309(g) to "adopt reasonable classifications of applications" by including ITFS stations in the classes of stations exempt from competitive bidding.

Auctioning ITFS Frequencies Would Be Contrary to the Public Interest

It would make no sense to exempt noncommercial educational radio and television stations, but not ITFS stations, from competitive bidding. As schools, colleges, governmental agencies and private nonprofit organizations, ITFS applicants often rely on public appropriations, charitable donations, or sometimes the fees they earn from the delivery of educational services for the funding they need to apply for, construct, operate and program their stations. One likely result of using competitive bidding to award disputed frequencies is that the most worthy applicants (that is, those most closely focused on providing educational services of value to the community), will be the least able to compete. Indeed, it is doubtful whether many public educational entities would be able to participate in an auction for frequencies, either because of legal or financial restrictions.

Regardless of whether local educational entities can bid, even if they do bid and prevail, the result of the competitive bidding process is that funds that otherwise would be put to use to provide education will be used to purchase the frequencies. This stunning reversal of policy inevitably will mean that the ITFS station's programming services will be less valuable than they could be otherwise, an intention that should not be attributed to Congress in the Balanced Budget Act.

Even taking into account that many ITFS applicants at this time rely on funding provided by prospective excess capacity users, competitive bidding makes no sense. If competitive bidding is applied to ITFS, ITFS frequencies will come to be awarded to applicants that are most closely tied to, and perhaps creatures of, commercial excess capacity users. It will be far easier for wireless cable companies, wireless Internet access providers or other excess capacity users to

create and use national "nonprofit" corporate vehicles, which are subject to their strong influence or control, than *bona fide* local educators to apply and bid for ITFS frequencies. Thus, the policies behind the current mutually exclusive application selection rule, Section 74.913, which favor local, accredited entities offering the greatest amount of educational programming, would be thwarted.^{1/}

Even if Competitive Bidding Applies to ITFS, It Should Not be Applied
to Pending Applications or Modification Applications

Even if the FCC determines that the Balanced Budget Act does in fact require it to use competitive bidding procedures to decide ITFS mutually exclusive cases for applications filed after July 1, 1997, the Act is clear that the FCC has discretion not to apply these procedures to pre-July 1, 1997 applications. New Section 309(l) of the Communications Act provides that the FCC shall "have the authority" to conduct competitive bidding to select among pre-July 1, 1997 competing applications "for initial licenses or construction permits for commercial radio or television stations...." This language differs markedly from the provisions of Section 309(j), which clearly requires competitive bidding for post-Balanced Budget Act applications. Indeed, given the limitation of Section 309(l) to commercial radio and televisions stations, it seems that the FCC may not even have the authority to auction pre-July 1, 1997 ITFS applications. From

^{1/} Since the adoption of the Second Report and Order in MM Docket No. 83-523, 101 FCC2d 49 (1985), which first established the comparative point procedure applicable to ITFS mutually exclusive applications under Section 74.913, research by undersigned counsel suggests that over 130 mutually exclusive ITFS cases have been decided, with relatively few requests for reconsideration, requests for review, and/or appeals. The point procedure for ITFS is one of very few FCC success stories in dealing with mutually exclusive applications, both as to the speed and ease of administration, and as to the results, which have favored the best qualified applicants.

the language of both Section 309(j) and 309(l), which in each case refers to "initial" licenses or construction permits, it also seems clear that the FCC does not have either the mandate, or the authority, to use competitive bidding for mutually exclusive situations involving applications for modifications to existing facilities, including existing ITFS facilities.^{2/}

Even if Competitive Bidding Applies to ITFS, Bidding Credits
or Other Appropriate Procedures Should be Used to Encourage Educational Use

The ITFS Parties hope that the FCC will never need to implement a system of competitive bidding for ITFS. If it does, however, the Commission should do so in a manner that provides the greatest possible credit in the process to applicants that, under the comparative selection criteria of Section 74.913, would be entitled to the greatest number of comparative points. The basis for this suggestion is the nature of education itself, which is first and foremost a local endeavor. Thus, since 1985, the Commission has favored those ITFS applicants that are local, accredited, not seeking licenses for more than four channels in the area, and that propose the greatest amount of educational programming. The ITFS Parties believe that, given the unique educational goals of the ITFS service, an applicant that would obtain the maximum number of comparative points under Section 74.913 should obtain bidding credits that would, in essence, permit it to prevail in the bidding process with no more than a nominal bid.

^{2/} The ITFS Parties believe that if any application in a mutually exclusive situation is a modification application, and thus not "auctionable," competitive bidding may not legally be applied in that situation.

If Necessary, the FCC Should Seek Clarification from Congress

For the reasons stated above, it is not good public policy to apply competitive bidding to ITFS. If the FCC determines that, under the Balanced Budget Act, it must use competitive bidding to resolve mutually exclusive ITFS situations, the FCC should seek clarification from Congress as to whether this result was intended. The FCC should not simply implement a selection process by which the ITFS service will be compromised, without an effort to determine whether that was what Congress actually understood and intended.

Respectfully submitted,

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